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Supreme Court, U.S.
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No. 95-0062

In The

Supreme Court of the United States

October Term, 1995

DYNAMIC CONSTRUCTION COMPANY and ANDREW M. KOWAL,

Petitioners,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LITA MASINI POPKE
Counsel of Record
WEISMAN, TROGAN, YOUNG & SCHLOSS, P.C.
Attorneys for Respondent
30100 Telegraph Road
Suite 428
Bingham Farms, Michigan 48025
(810) 258-2700

7200
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTIONS PRESENTED

1. Did the Sixth Circuit and District Court correctly temper the leniency normally given to a *pro se* litigant with Mr. Kowal's familiarity with the legal system?

2. Did the Sixth Circuit and District Court correctly apply Michigan law governing attorney fee awards?

LIST OF PARTIES

This Petition for Writ of Certiorari is brought by Andrew M. Kowal ("Mr. Kowal"), individually, and Dynamic Construction Company, a Michigan Corporation ("Dynamic Construction").

On August 19, 1994, the Sixth Circuit Court of Appeals entered an order requiring that Dynamic Construction obtain legal counsel or the appeal would be dismissed. On September 14, 1994, Robert S. Rollinger appeared "Of Counsel" on behalf of Dynamic Construction. Despite this appearance, however, Mr. Rollinger never filed a single pleading. All pleadings filed in the Sixth Circuit subsequently were filed by Andrew M. Kowal, In Pro Per, on behalf of Defendant/Appellant.

Similarly, Mr. Kowal initially filed this Petition "In Pro Per for Petitioners." This Court, however, required that Dynamic Construction be represented by counsel and rejected the initial Petition. It appears that Petitioners' "new" counsel, Robin M. Kennedy, "ghost wrote" Mr. Kowal's initial filing since he merely placed a label with his name over the pleadings filed by Mr. Kowal.

Respondent, Insurance Company of North America ("INA"), has been represented by Lita Masini Popke since the inception of this case.

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No. 95-0062

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Petitioners,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Insurance Company of North America, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, Dynamic Construction and Mr. Kowal.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit (January 9, 1995) and the Order Denying Petitioners' Petition for Rehearing (March 15, 1995) are unpublished; however, the orders are reproduced in the Appendix to Petitioners' Petition for Certiorari. (App. 44-53).

The Order of the United States District Court for the Eastern District of Michigan, Southern Division (January 7, 1993), and the District Court's Memorandum Opinion and Order denying Petitioners' Motion for Reconsideration (April 5, 1993) are unpublished; however, the orders are reproduced in the Appendix to Petitioners' Petition for Certiorari. (App. 54-63).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the Sixth Circuit Court of Appeals was invoked pursuant to 28 U.S.C. § 1291 as an appeal as a matter of right.

The jurisdiction of the United States District Court for the Eastern District of Michigan, Southern Division, was invoked pursuant to 28 U.S.C. § 1332(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions involved in this case, nor are there any questions of federal law.

STATEMENT OF THE CASE

On April 8, 1975, Andrew and Margaret Kowal executed an Indemnity Agreement which specified that they indemnify INA from and against every claim, demand, loss, liability, cost, charge, attorney fees, expense, suit, order, judgment or adjudication that the company shall or may for any cause at any time sustain, incur, or become subject to by reason of executing any such bonds."[1] On July 30, 1975, Dynamic Construction Company also executed an Agreement of Indemnity which provided that INA would be indemnified against losses, including attorney fees.

On July 22, 1988, INA filed suit against Andrew Kowal, Margaret Kowal and Dynamic Construction Company in the United States District Court for the Eastern District of Michigan, Southern Division, for indemnification, exoneration and reimbursement. INA filed a Motion for Summary Judgment on October 25, 1988. INA requested both a judgment for amounts already paid by INA pursuant to the Bonds and for the attorney fees incurred.

On March 1, 1989, the District Court issued a Memorandum Opinion and Order granting INA's Motion for Summary Judgment. The District Court held, as a matter of law, that INA

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1. On page 5 of its Petition, Petitioners state:

> "Both indemnity agreements provide that the indemnitors are liable for INA's attorney fees only if INA is *required* to take legal action to enforce the indemnitors covenant to cover INA's reserve on demand. . . ." Petitioners attempt to slant the language in a way not intended. Moreover, the language referenced has not been raised in any appeal and the agreement speaks for itself.

was entitled to an award of attorney fees. A Judgment was entered on June 19, 1989, which included attorney fees. (Appendix A). On September 19, 1989, Magistrate Morgan also entered an Order awarding INA additional attorney fees. (Appendix B). Neither the March 1, 1989 Order nor the subsequent two judgments were appealed by Mr. Kowal, Mrs. Kowal or Dynamic Construction. The Defendants were represented by counsel at the time.

Following the Judgment entered by the District Court on September 19, 1989, the following motions were filed and ruled upon:

1. February 22, 1990 – Kowal's Motion to Limit Discovery. The Motion was Denied by an Order of the District Court dated March 28, 1990.

2. April 6, 1990 – Kowal's Objection to Magistrate's Decision and Appeal to District Court Judge on Motion to Limit Discovery. The District Court affirmed Magistrate's Order Denying the Motion to Limit Discovery on April 30, 1990.

3. April 11, 1990 – INA's Motion to Compel Production of Documents. An Order was entered on May 2, 1990 requiring Kowal to provide documents.

4. April 27, 1990 – Kowal's Petition for Installment Payments. The Motion was denied on June 22, 1990.

5. May 3, 1990 – Kowal's Motion to Clarify April 30, 1990 Opinion Affirming Magistrate's Order Denying Motion to Limit Discovery. The Motion was denied in an Order dated June 22, 1990.

6. May 10, 1990 – Andrea Coccia's (Mr. Kowal's daughter) Motion to Abandon Garnishment and Seizure of Trust Assets. Threatened litigation was never filed by Ms. Coccia and the Motion was withdrawn.

7. May 16, 1990 – INA's Motion for Order to Show Cause. The Motion was granted and the Order was entered on May 25, 1990.

8. June 1, 1990 – Defendant's Motion and Objection to Entry of an Order Setting Aside Transfer of Assets. The Motion was denied in an Order dated June 22, 1990.

9. June 8, 1990 – INA's Motion for Assessment of Costs and Attorney Fees. The Motion was denied without prejudice on April 2, 1992. The Motion was refiled on October 20, 1992 and granted.

10. June 8, 1990 – INA's Motion for Entry of Judgment Against Garnishee Defendant. The Motion was granted in an Order dated June 22, 1990.

11. June 13, 1990 – Defendant's Motion to Stay Execution of Attachment and Garnishment Pending Appeal. The Motion was denied or rendered moot in an Order of June 22, 1990.

12. June 27, 1990 – Kowal's Motion to Amend Order and Objection to Entry of June 22, 1990 Order. The Motion was denied in an Order dated July 24, 1990 and Defendant was sanctioned pursuant to Federal Rule of Civil Procedure 11.

13. July 3, 1990 – Defendant's Motion for Replevin and for Bond of Replevin. The Motion was denied in Order dated July 24, 1990 and Defendant sanctioned pursuant to Federal Rule of Civil Procedure 11.

14. July 27, 1990 – Motion of Defendants' attorney to withdraw.

15. July 31, 1990 – Defendants' Counter-Motion for Sanctions and Costs Against Plaintiff. The Motion was denied in an Order dated April, 1992 with the court stating that "defendants have engaged in a protracted pattern of harassment, leading the Court to the conclusion that defendants have abused the judicial process."

16. October 20, 1992 – Plaintiff's Motion for Costs and Attorney Fees. The Motion was granted on January 7, 1993.

17. January 22, 1993 – Defendant's Motion for Rehearing or Reconsideration to Amend the January 7, 1993 Judgment. The Motion was denied in Order dated April 5, 1993.

18. Defendant's Petition for Installment Payments. The Motion was denied in an Order dated June 4, 1993.

19. June 30, 1993 – Defendant's Motion for Reconsideration of Order of June 4, 1993. The Motion was denied in an Order dated July 14, 1993.

20. August 10, 1993 – Judgment entered in favor of INA in the amount of $19,590.56 *nunc pro tunc* to January 7, 1993.

In addition to the above-referenced pleadings filed in the District Court, the Defendants also filed five Claims of Appeal with the United States Court of Appeals for the Sixth Circuit, all of which were dismissed. Defendants' Petitions for Rehearing were also denied.

This procedural history is necessary for the Court's evaluation of the issues contained in the Petition for the reason

that the arguments raised by Petitioners were raised on a number of prior occasions and, therefore, were not properly the subject matter of this appeal. Moreover, the Petitioners' protracted history of filing frivolous motions and appeals is also apparent.

Most importantly, the District Court's initial determination that INA was entitled to attorney fees was rendered in a March 1, 1989 Opinion. (Appendix C). This Order was never appealed. INA's entitlement to attorney fees became the law of the case and the subsequent judgments were entered in accordance with the original Order. Any arguments which Petitioners had regarding INA's entitlement to attorney fees under the terms of the Indemnity Agreement cannot be made the subject matter of this appeal by simply reiterating their position again and again throughout a variety of pleadings. Therefore, each of the following arguments raised by Petitioners is not subject to review.[2]

(1) INA is not entitled to fees incurred in connection with post-judgment proceedings.

(2) Post-judgment attorney fees were not incurred "by reason of executing" the bond.

(3) INA may only recover fees if it is required to take legal action; fees for collection efforts are not recoverable.[3]

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2. *See United States v. Alvarez-Sanchez*, __ U.S. __, 114 S. Ct. 1599, 1605 (1994) (If an argument is not specifically raised in either the District Court or the Court of Appeals, the argument is waived below and this Court must decline to address the argument.); *see also, Granfinaciera, S.A. v. Nordberg*, 492 U.S. 33, 38-9 (1989); *Heckler v. Campbell*, 461 U.S. 458, 468-9, n. 12 (1983).

3. This argument is being raised for the first time in connection with this Petition for Writ of Certiorari.

(4) INA's post-judgment action violated the "good faith" provisions of the Indemnity Agreement.

(5) INA should have satisfied its principal judgment from Dynamic assets rather than seeking to collect the judgment from Mr. Kowal individually.

(6) Decisions rendered by the District Court in another case are relevant to the present appeal.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE COURT OF APPEALS HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS NOR SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT.

Rule 10 of the Rules of the Supreme Court provides that a review on Writ of Certiorari is a matter of judicial discretion which will only be granted "when there are special and important reasons therefor." U.S. Sup. Ct. Rule 10, 28 U.S.C.A. Of the three reasons outlined in Rule 10 that would be considered by the Court, only the first has arguably been raised by the Petitioners.[4] Rule 10.1(a) states:

(a) When a United States Court of Appeals

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4. At page 23 of the Petition, Dynamic Construction and Mr. Kowal accused the Sixth Circuit of an unwarranted and substantial departure from the accepted and usual course of proceedings in order to sanction a similar departure by the District Court. . .". Petitioners are incorrect.

> has rendered a decision in conflict with the decision of another United States Court Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; *or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.* (Emphasis added).

In the present case, there has not been a departure from "the accepted and usual course of judicial proceedings" so as to warrant Supreme Court intervention. The Petitioners' only argument is that the District Court and Court of Appeals incorrectly applied Michigan law or applied an incorrect standard to a *pro se* litigant. Neither of these issues rise to the level that necessitates Supreme Court intervention. "Generally, the Supreme Court will not overturn a decision of the Court of Appeals on a matter of local law unless the appellate court's determination is clearly incorrect." 13 James Wm. Moore, *et al.*, *Moore's Federal Practice* ¶ 810.25-1[3] (2d ed. 1995).

> The Supreme Court cannot undertake to see that every case in a federal court is decided as the state court would have decided it. At best, it must confine its interposition to cases in which a Circuit Court of Appeals has announced a rule, potentially governing a substantial number of other cases, in conflict with the rule announced by authoritative state court decisions.

Huddleston v. Dwyre, 322 U.S. 232, 237 (1944).

The Sixth Circuit Court of Appeals did not "announce a rule" in this case. In fact, it simply determined that the District Court had not abused its discretion under both federal and Michigan law and it was satisfied, based on an independent review of the itemized fees, that no abuse of discretion occurred here." Petitioners' Appendix, p. 50.

II.

THE COURT OF APPEALS AND DISTRICT COURT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THE APPLICATION OF STANDARDS TO *PRO SE* LITIGANTS.

Petitioners claim that they were improperly held to the same standards as an attorney in meeting procedural deadlines and requirements for submission of briefs. This is an inappropriate basis upon which to request a Writ of Certiorari. The courts will generally hold *pro se* litigants to less stringent standards in the interpretation of complaints or other formal pleadings. *Haines v. Kerner,* 404 U.S. 519 (1972). *Pro se* litigants, however, must comply with the procedural requirements of the court in which they appear. *Bolden v. Odum,* 695 F.2d 549 (11th Cir. 1983) (Appellant's appeal dismissed by the court because *pro se* litigant failed to file a timely appeal). Moreover, the leniency that a *pro se* litigant is often granted may be tempered by his/her familiarity with the court. More sophisticated *pro se* litigants cannot plead ignorance of the rules with impunity. As stated by the court in *Raitport v. Chemical Bank,* 74 F.R.D. 128 (S.D.N.Y. 1977):

> This is not a case involving an uneducated, naive plaintiff who may have inartistically stated a valid cause of action. See *Haines v Kerner.* . . . Mr. Raitport has spent more time in court than many lawyers. If there existed a viable cause of action against these

defendants, he is capable of discovering it and stating it. As Chief Judge Kaufman once said with respect to another active *pro se* litigant:

> He comes before this court wearing the cloak of a *pro se* applicant and seeks to extract from us the solicitude ordinarily afforded one appearing without counsel. But this should not shield him from rebuke when merited. He is an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared frequently on his own behalf both in the District Court and the Court of Appeals. We would expect that one possessed of his background would be conscious of the outer limits of forceful advocacy and fully aware when his acts transgress those limits. Moreover, we are not to be manipulated by resourceful but meritless moves . . . (which) serve only to distract us from important judicial business.

Acker v. Bryan, Docket No. 27240 (2d Cir. June 21, 1963) (Kaufman, J., concurring).

Raitport, 74 F.R.D. at 132.

In the present case, Mr. Kowal was represented by counsel throughout the District Court proceedings prior to the entry of judgment. Since that time, he has represented himself and filed and defended numerous motions as outlined in this brief. The District Court and Court of Appeals exercised extreme leniency

when determining which of the Petitioners' pleadings should be considered. In fact, the District Court even permitted Dynamic to file pleadings without legal counsel.

Furthermore, Respondents verily believe that Mr. Kowal strategically attempted to elicit this Court's "less stringent standard" or at least make it appear as if this is a case of David — Mr. Kowal, *pro se* — versus Goliath — INA and its attorney — by initially filing this Petition as "Andrew M. Kowal, In Pro Per for Petitioners". After seven years of litigation with Mr. Kowal, it was readily apparent that Mr. Kowal did not draft this initial pleading. In fact, after this Court rejected this initial pleading because Mr. Kowal cannot represent Dynamic Construction, Petitioners submitted exactly the same Petition as before except that attorney Robin M. Kennedy's name and address is superimposed with a label over each instance where Mr. Kowal's name had been representing Petitioners "in pro per". Respondent believes that Petitioners submitted a "ghost written" Petition to gain a greater latitude of judicial discretion in this case. In the recent case of *Johnson v. Bd. of Commn's for the Cty. of Freemont*, 868 F. Supp. 1226 (D. Colo. 1994), the United States District Court for the District of Colorado had the opportunity to point out what is so troubling about this issue:

> [P]leadings seemingly filed *pro se* but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The *pro se* litigant would be granted greater latitude as a matter of judicial discretion in

> hearings and trials. The entire process would be skewed to the distinct disadvantage of the non-offending party.
>
> Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P.
>
> What we fear is that in some cases, actual members of the Bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the Bar, typified by F.R.Civ.P. 11, but which exists in all cases, criminal as well as civil, of representing to the court that there is a good ground to support the assertions made. We cannot approve of such a practice. If a brief is prepared in any substantial part by a member of the Bar, it must be signed by him. We reserve the right, where a brief gives occasion to believe that the petitioner has had legal assistance, to require such signature, if such, indeed, is the fact.

Id. at 1231-2.

Mr. Kowal's attempt to invoke a more lenient standard is inappropriate. The District Court and Court of Appeals did not treat the Petitioners harshly. Nothing contained within the decisions of the Court of Appeals or the District Court amounts to a departure from the accepted and usual course of judicial proceedings that would warrant the Supreme Court's intervention.

III.

THE COURT OF APPEALS AND DISTRICT COURT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN CONNECTION WITH DETERMINING THE REASONABLENESS OF ATTORNEY FEES ESTABLISHED BY INA.

Petitioners' second basis for seeking a Writ of Certiorari argues that the Court of Appeals departed from the accepted and usual course of judicial proceedings and sanctioned such a departure from the District Court by not requiring INA to submit to an evidentiary hearing. This argument as well falls far short of raising an issue for consideration by the United States Supreme Court.

As mentioned earlier, it is not the obligation of the United States Supreme Court to ensure that every decision rendered by a Court of Appeals has been decided as a state court would decide it. The District Court's determination of reasonableness and the de novo review by the Court of Appeals were both soundly supported by Michigan law. In *Wood v. Detroit Auto. Inter-Insurance Exchange,* 413 Mich. 573, 588, 321 N.W. 2d 653 (1982) the Michigan Supreme Court adopted the guidelines for determining the reasonableness of attorneys' fees as set forth in *Crawley v. Schick,* 48 Mich. App. 728, 737, 211 N.W. 2d 217 (1973). The Michigan Supreme Court stated, however, that the trial court need not detail its findings as to each specific factor and further stated that an award of attorney fees "will be upheld unless it appears upon appellate review that the trial court's finding on the "reasonableness" issue was an abuse of discretion." *Wood* at 588.

The Petitioners have also mis-cited the law with regard to their statement on pages 34 and 35 of the Petition that an

evidentiary hearing to determine the "reasonableness" of attorney fees is mandatory under Michigan law (citing *Maple Hill Apartment Co. v. Robert W. Stein, AIA,* 147 Mich. App. 687, 382 N.W. 2d 849 (1985)). The Michigan Supreme Court has never announced such a mandate.

CONCLUSION

The issues raised by Petitioners fail to demonstrate that the Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings and/or sanctions, or that there is such a departure by the District Court so as to call for an exercise of this Court's power of supervision.

WHEREFORE, Respondent respectfully requests this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

LITA MASINI POPKE
Counsel of Record
WEISMAN, TROGAN, YOUNG & SCHLOSS, P.C.
Attorneys for Respondent
30100 Telegraph Road
Suite 428
Bingham Farms, MI 48025
(810) 258-2700

Dated: August 7, 1995.

APPENDIX A — JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED JUNE 19, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72993-DT

JUDGE LAWRENCE P. ZATKOFF

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Plaintiff,

-vs-

DYNAMIC CONSTRUCTION COMPANY, ANDREW M. KOWAL and MARGARET A. KOWAL, Jointly & Severally,

Defendants.

PHILLIP G. ALBER P24802
LITA MASINI POPKE P35686
Attorneys for the Plaintiff
2400 First National Building
Detroit, Michigan 48226
Phone: (313) 965-1700

JEANNE STEMPIEN P31381
Attorney for the Defendants
38705 Seven Mile Rd., #250
Livonia, Michigan 48152
Phone: (313) 464-4500

Appendix A

JUDGMENT

At a session of said Court, held in the City of Detroit, County of Wayne and State of Michigan on 19 JUN 1989

PRESENT: LAWRENCE P. ZATKOFF
U.S. DISTRICT JUDGE

This matter having come before the court on INA's Motion for Summary Judgment, and the Court having read the Briefs, and having issued a Memorandum, Opinion and Order on March 1, 1989, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED in accordance with the Court's Memorandum, Opinion and Order of March 1, 1989, that judgment be and the same hereby is entered in favor of the Plaintiff, Insurance Company of North America, and against the Defendants, Margaret A. Kowal, Andrew M. Kowal and Dynamic Construction Co., jointly and severally, in the amount of $29,102.95 which is equal to the $33,635.34 INA paid B.I.F., plus $3,395.40 in attorney fees, costs and expenses, plus $1,888.78 in interest from the date of filing the Complaint through April 14, 1989, minus $9,816.57 setoff for amount paid to INA by Dynamic in connection with another project.

SO ORDERED.

s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED SEPTEMBER 19, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72993-DT

JUDGE LAWRENCE P ZATKOFF

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Plaintiff,

-vs -

DYNAMIC CONSTRUCTION COMPANY, ANDREW M. KOWAL and MARGARET A. KOWAL, Jointly & Severally,

Defendants.

PHILLIP G. ALBER P24802
LITA MASINI POPKE P35686
Attorneys for the Plaintiff
2400 First National Building
Detroit, Michigan 48226
Phone: (313) 965-1700

GREGORY J. STEMPIEN P20971
JEANNE STEMPIEN P31381
Attorney for the Defendants
38705 Seven Mile Rd., #250
Livonia, Michigan 48152
Phone: (313) 464-4500

ORDER DENYING DEFENDANTS' MOTION TO AMEND JUDGMENT, GRANTING INA'S MOTION FOR SANCTIONS; AND ENTRY OF JUDGMENT

Appendix B

At a session of said Court held in the City of Detroit, Michigan on SEP 19 1989

PRESENT: VIRGINIA M. MORGAN

This matter having come before the Court on the Motion of the Defendants to Amend the Judgment, and the Plaintiff, INA, having filed a Response and a Counter Motion for Sanctions, and the Court having reviewed the Briefs, heard oral argument September 11, 1989, and being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that the Defendants' Motion to Amend Judgment be and the same hereby is denied.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Sanctions is granted. In addition to the amounts set forth in the Court's Judgment of June 19, 1989, INA is hereby awarded an additional $492.36 in pre-judgment interest from April 14, 1989 to June 19, 1989. INA is also awarded $2,292.00 in additional attorney fees pursuant to the Indemnity Agreement between the parties.

IT IS THEREFORE ORDERED that judgment be and the same hereby is entered in favor of the Plaintiff, Insurance Company of North America, and against the Defendants, Dynamic Construction Company, Andrew and Margaret Kowal, in the additional amounts of $492.36 and $2,292.00 for a total additional judgment of $2,784.36.

SO ORDERED.

s/ VIRGINIA M. MORGAN
MAGISTRATE VIRGINIA MORGAN

Appendix B

"APPROVED AS TO FORM"
s/ Gregory J. Stempien/per auth. 9-12-89
GREGORY J. STEMPIEN P20971
Attorney for the Defendants

s/ Lita Masini Popke
LITA MASINI POPKE P35686
Attorney for the Plaintiff

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED MARCH 1, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72993-DT

HONORABLE LAWRENCE P. ZATKOFF

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Plaintiff,

vs.

DYNAMIC CONSTRUCTION COMPANY, ANDREW M. KOWAL and MARGARET A. KOWAL, Jointly & Severally,

Defendants.

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 1st day of March, 1989.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Appendix C

INTRODUCTION

Presently before the Court is Plaintiff's Motion for Summary Judgment. Summary judgment is appropriate where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1986); Fed. R. Civ. P. 56(c). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, __, 106 S.Ct. 2548, 2552-2553 (1986). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986); *United States v. Diebold*, 368 U.S. 654 (1962); *Cook v. Providence Hosp.*, 820 F.2d 176, 179 (6th Cir. 1987); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979), *cert. dismissed*, 444 U.S. 986 (1979). In deciding a motion for summary judgment, the Court must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at __, 106 S.Ct. at 2512. Although summary judgment is disfavored, this motion may be granted when the trial would merely result in delay and unneeded expense. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (5th Cir. 1986). Where the non-moving party has failed to present evidence on an essential element of their case, they have failed to meet their burden and all other factual

disputes are irrelevant and thus summary judgment is appropriate. *Celotex*, 477 U.S. at __, 106 S.Ct. at 2553; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. __, 106 S.Ct. 1348, 1356 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnote omitted)).

I. FACTS

The plaintiff, Insurance Company of North America (INA), is engaged, in part, in the business of issuing surety bonds. A surety bond in a broad sense is a contract whereby one person (the surety) binds himself to answer for the debt, default, or miscarriage of another (the principal). Nonetheless, as between the principal and the surety who are so bound, it is the principal, rather than the surety, who should perform.

The defendant, Dynamic Construction Company (Dynamic), is a construction company which performs work that often requires that a surety bond be posted. INA often issued these surety bonds on behalf of Dynamic. As partial consideration for the issuance of these bonds, INA required Dynamic and two of its officers, Andrew and Margaret Kowal, to execute indemnity agreements. An indemnity agreement is a contract between two parties whereby one (i.e., the Kowals and Dynamics undertakes and agrees to indemnify the other (i.e., INA) against loss or damage arising from the claim or demand of a third person.

On October 1, 1981, INA issued a Performance Bond on behalf of Dynamic and in favor of the Village of Archbold, Ohio. The principal was Dynamic, the surety INA and the obligee was

the village. The Bond guaranteed the performance of Dynamic on its contract with he Village of Archbold. The Bond also provided guarantees that all subcontractors, materialmen and laborers would be paid.

On June 21, 1982, Dynamic entered into a subcontract with B.I.F. Division of General Signal Controls, Inc. (B.I.F.) to perform certain work and to furnish certain goods and equipment in connection with the contract for the Village of Archbold. Subsequently, Dynamic did not pay B.I.F. in full. Therefore a claim was made against the Performance Bond. B.I.F. filed suit against Dynamic and INA in the United States District Court, Southern District of New York. Pursuant to the litigation, INA paid B.I.F. $33,635.34 on May 20, 1988. In addition, as a result of having executed or procured the execution of the Bond, INA incurred attorney fees and expenses of $3,968.00 through September 30, 1988. (Affidavit of Doreen Wise). Plaintiff seeks judgment in the amount of $27,787.07 which is equal to the $33,635.34 INA paid B.I.F. pursuant to the litigation, plus $3,968.00 for attorneys' fees and expenses, minus $9,816.57 setoff for amounts paid to INA by Dynamic in connection with another project. INA argues that pursuant to the Indemnity Agreements, Dynamic, Andrew Kowal and Margaret Kowal are liable to INA for the money paid by INA to B.I.F., plus attorney fees.

II. LAW AND ANALYSIS

There are four indemnification contracts to which reference has been made in this lawsuit. The first contract, dated April 8, 1975, was executed by Andrew and Margaret Kowal in favor of INA.[1] The second contract, dated July 30, 1975, was executed by Dynamic in favor of INA.[2] The other two contracts were executed

subsequent to INA's issuance of the performance bond in the Dynamic — City of Archbold contract. As such, the Court finds the latter two contracts irrelevant to the case at bar. Neither contract could reasonably be interpreted to be retroactive to the date of the construction contract relevant to this suit. On the other hand, the two preceeding contracts, both executed in 1975, are relevant. These two contracts, dated April 8, 1975 and July 30, 1975 respectively, essentially state that Margaret and Andrew Kowal individually, and Dynamic Construction Co., will indemnify INA for any and every claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication that the company (INA) may incur by reason of executing surety bonds. These two contracts were entered into prior to October 1, 1981, the date INA issued the Performance Bond on behalf of Dynamic in favor of the Village of Archbold, Ohio. The question of whether Dynamic, Andrew or Margaret Kowal are liable rests, in part, on interpretation of the 1975 Indemnity Agreements.

It is well settled under Michigan law that indemnity contracts are construed in accordance with the rules for the construction of contracts generally. *Title Guaranty & Surety Co. v. Roehm*, 215 Mich. 586, 184 N.W. 414 (1921); *Meadows v. Depco Equipment Co.*, 4 Mich. App. 370, 144 N.W. 2d 844 (1966); *Paquin v. Harnischfeger Corp.*, 113 Mich. App. 43, 317 N.W. 2d 279 (1982). Contracts generally must be construed to effectuate the intention of the parties who are bound by all of the terms of the executed contract. 17 Am. Jur. 2d "Contracts," 59. Indemnity contracts, like other contracts, are to be enforced so as to effectuate the intention of the parties. *Calladine v. Hyster Co.*, 155 Mich. App. 175, 399 N.W. 2d 404 (1986).

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III. DEFENDANTS' ARGUMENTS

The defendants have raised several arguments in support of their contention that they should not be held liable under the terms of the indemnification contracts.

A.

Defendants' first argument is that the April, 1975 contract does not contain any language indicating that execution of subsequent indemnity agreements would not have an effect on the enforcement of the April, 1975 contract. Therefore, defendant contends it would be reasonable for the Kowals to expect that subsequent documents of indemnity executed by Dynamic would eliminate their personal liability. This argument is completely without merit. Execution of subsequent indemnity agreements by a different party does not discharge the first party's obligation. As stated in 41 Am. Jur. 2d, "Indemnity," § 37, the receipt of an indemnity bond from a subsequent indemnitor does not supersede a prior agreement of indemnity by another person or discharge the obligation of the first indemnitor. Therefore, regardless of the July 30, 1975 Indemnity Agreement executed by Dynamic, Andrew and Margaret Kowal remained personally liable under their April, 1975 Indemnity Agreement.

B.

The Kowals also argue that they were "personally" released from the indemnity contract as a result of a letter sent by INA's agent, Knox Branden. The letter, dated April 30, 1982, states that the Kowals personal backing was eliminated by the execution of the subsequent April 27, 1982 contract by Dynamic. Likewise, this argument is without merit. Regardless of INA's agent's

statement, the April, 1975 Indemnity Agreement under which the Kowals are individually liable remained in full force and effect "until ten days after receipt by the company of written notice by registered mail addressed ... revoking this Agreement of Indemnity. . . ." (Indemnity Agreement dated April 8, 1975). Under the clear language of the April 8, 1975 Agreement of the individual defendants, their liability could not be extinguished unless notice was sent to the company. No such notice was sent. Even if notice had been sent, the release would have only been prospective from the date of the notice and would not have applied to any bonds previously executed. In this case, the Indemnity agreement under which the Kowals are personally liable was executed in 1975. The relevant Performance Bond was issued in 1981. Therefore, even if the April 30, 1982 letter effectively discharged the Kowals from their 1975 Agreement, it would only have done so prospective from the date of the letter and would have no effect on the 1981 Performance Bond.

C.

Next, defendants question whether a legitimate bond claim was made by B.I.F. because the Bond states that it was a performance bond and not a payment bond. Simply, the language of the bond states that all lawful claims of subcontractors, materialmen and laborers must be paid. The language of the bond clearly states that INA was obligated to pay where the principal did not. In this regard, the language of the Indemnity Agreements entered into between the parties must be construed to give full effect to the unambiguous terms. *Giguere v. Detroit Edison Co.*, 114 Mich. App. 452, 319 N.W. 2d 334 (1982).

In addition, defendants claim that the payment by INA to B.I.F. was not made in good faith because INA did not assert the

defenses of Dynamic and did not give notice to Dynamic of payment. First of all, it is clear that INA did not assert of defenses of Dynamic prior to making payment to B.I.F. because Dynamic had waived those defenses by entering into a settlement agreement and having a judgment entered against it. A surety may assert only those substantive defenses on the bond itself. *Ackron Contracting v. Oakland County,* 108 Mich. App. 767, 310 N.W. 874 (1981). Furthermore, once a judgment is entered against a principal, that judgment is *prima facie* evidence of liability against the surety. It is the opinion of this Court, therefore, that since defendant was represented by counsel, entered into a settlement agreement and had judgment entered against it, Dynamic waived its defenses.

E.

The defendants also argue that INA's payment was not made in good faith because Dynamic was not notified of the payment. This argument is groundless. The indemnity agreement executed by Dynamic on July 30, 1975 provides that the surety shall have the right to pay any judgment without the consent or approval of the contractor. Also important, is the fact the Dynamic was involved in litigation with the subcontractor whose judgment was paid by INA. As such, Dynamic is hard pressed to argue bad faith and rely on lack of knowledge of its surety's actions when Dynamic itself was involved in the litigation from which the payment was made.

F.

Lastly, defendants' argument that both indemnity agreements entered into in 1975 were unconscionable and adhesive is outrageous. The Court finds it unnecessary to address such a groundless contention.

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CONCLUSION

Therefore, the Court finds the defendants Margaret Kowal, Andrew Kowal and Dynamic Construction Company jointly and severally liable for the losses sustained by INA on the Performance Bond dated October 1, 1981. With regards to the attorneys' fees, however, the court will reserve judgment until the plaintiff thoroughly documents such fees in regards to its claim. Plaintiff shall have 10 days from the date of the Opinion to submit a proposed judgment and documentation of attorneys' fees. Defendant shall then have 7 days to file any objection thereto.

IT IS SO ORDERED.

s/ L.P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

[stamped]
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FOLLOWING:
Atty. Phillip G. Alber
Atty. Jeanne Stempien
on March 1, 1989
s/ R.P. Nastwold
DEPUTY CLERK

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FOOTNOTES

1. The agreement reads in pertinent part:

> 3. That the Indemnitor [Andrew and Margaret Kowal] will perform all the obligations of any such bond(s) and will at all times indemnify and keep indemnified the Company [INA] from and against every claim, demand, loss, liability, cost, charge, attorneys' fee, expense suit, order, judgment or adjudication that the Company shall or may for any cause at any time sustain, incur or become subject to by reason of executing any such bond(s). (Emphasis added).
>
> 4. That the Indemnitor's liability hereunder shall, without however limiting the indemnity provided in the preceding paragraph, extend to and include all costs, expenses and attorneys' fees incurred or sustained by the Company in making any investigation on account of any such bond(s), in prosecuting or defending any action brought in connection therewith, in obtaining or seeking to obtain a release therefrom and in enforcing any of the agreements herein contained.

2. The agreement reads in pertinent part:

> SECOND: That Contractor shall perform all the conditions of such bond(s), and any and

all renewals and extensions thereof, and shall at all times indemnify and save the Company harmless from and against any claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication and shall place the Company in funds to meet every such claim, demand, loss, liability, cost, charge, attorneys' fee, expense suit, order, judgment or adjudication by reason of such bond(s) and all renewals and extensions thereof, before it shall be required to make payment. (Emphasis added).